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No. 03-1601

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CITY OF RANCHO PALOS VERDES, *et al.*,

Petitioners,

v.

MARK J. ABRAMS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION ("CTIA") AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

The Cellular Telecommunications & Internet Association ("CTIA") represents all sectors of the wireless communications industry. Members of CTIA include service providers, manufacturers, wireless data and Internet companies, and other industry participants. CTIA frequently participates in Federal Communication Commission ("FCC") proceedings and coordinates efforts to educate government agencies and the public about wireless issues. CTIA has been involved in tower siting issues for decades. It participated in the FCC's 1994 proceeding examining the ways in which local zoning board decisions had stymied the deployment of wireless infrastructure. That proceeding led directly to the passage of the statutory provision at issue in this case, 47 U.S.C. § 332(c)(7). CTIA was also actively involved in the legislative process that led to enactment of § 332(c)(7). CTIA has presented its views in testimony before Congress, and has filed numerous *amicus* briefs in the federal courts on behalf of the wireless industry.[2]

Given its direct participation in the processes that led to the enactment of § 332(c)(7) and its membership, CTIA is in a unique position to inform the Court as to the history and purpose of § 332(c)(7) and why § 1983 remedies are critical to effective vindication of the rights created by § 332(c)(7).

STATEMENT

1. Modern "cellular" telephony[3] works by dividing a large geographic region into smaller "cells," each of which is served

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, CTIA states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than CTIA, its members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] CTIA has filed *amicus* briefs in, *inter alia*, *Cincinnati SMSA L.P. v. Pub. Utils. Comm'n of Ohio*, No. 02-1711 (U.S.); *Bartnicki v. Vopper*, 532 U.S. 514 (2001); *AT&T Wireless Servs. v. Tenore*, No. 98-947 (U.S.); and *Cellco Partnership v. Hatch*, No. 04-3198 (8th Cir.).

[3] A "cellular phone" is a device using any one of a number of discrete radio services, separately licensed by the FCC, including cellular (the original technology), Personal Communications Service ("PCS") (a competitive technology licensed in 1994), and certain types of Specialized Mobile Radio ("SMR") (a cellularized service model).

by a base station sited on a tower or other structure, such as a water tower or a building. When a user makes a call, the handset automatically communicates with the base station that provides the strongest transmission. As the user moves through a service area, the network hands the call from one base station to another. By using relatively low-power, short-range handsets to communicate with a network of relatively low-power base stations, cellular technology minimizes the interference between customers in different parts of a service area, and allows a slice of radio spectrum to serve a far higher number of people in a given region.

The nature of cellular technology means that, to ensure reliable communications, a wireless operator must construct a network of two-way radio antennae throughout its service area. The number of antennae needed depends on many factors, including the radio frequency used, the transmission technology employed, the surrounding terrain, and the number of subscribers. Generally, the larger the number of subscribers, the more cells and thus the more antennae are required to provide service. *See* WILLIAM C.Y. LEE, MOBILE COMMUNICATIONS ENGINEERING 9 (1982).

The need to site and place antennae and the towers to which they are attached has led to conflicts between the wireless industry and local zoning authorities. Wireless carriers often had to seek "variance[s]" or "conditional use permit[s]" from local zoning boards, which historically had neither clear rules nor zoning classifications for wireless facilities. Kevin M. O'Neill, *Wireless Facilities Are a Towering Problem: How Can Local Zoning Boards Make the Call Without Violating Section 704 of the Telecommunications Act of 1996?*, 40 WM. & MARY L. REV. 975, 986-87 n.62 (1999) (*"Towering Problem"*). "In some cases, a small community simply denies the permit, and cellular providers are forced to delay operations as they appeal or rework an entire plan at huge costs to the provider." Gregory M. Kratofil, Jr., *The Telecommunications Act of 1996 and Section 704: A "Boom" or "Bust" for the Mobile Telephony Industry*, 16 ST. LOUIS PUB. L. REV. 499, 505 (1997) (*"Boom or Bust"*).

2. The FCC granted the first cellular communications license in 1983. State and local regulatory burdens, zoning laws,

and policies directed at protecting incumbent wireline telephone companies contributed to the sluggish pace of cellular expansion in the early 1980's. Leonard Kennedy and Heather Purcell, *Section 332 of the Communications Act of 1934: A Federal Regulatory Framework That Is "Hog Tight, Horse High, and Bull Strong,"* 50 FED. COMM. L. J. 547, 559 (1997-1998) (*"Hog Tight"*). Rapid growth of cellular telephony began in the late 1980's with the introduction of smaller and less expensive handsets and the advent of more attractive price plans. As of December 1991, there were approximately 7.5 million cellular subscribers nationwide. *CTIA Industry Mid-Year Data Survey* (June 30, 1994). By 1994, that figure had grown to more than 19 million; despite this rapid growth, only seven percent of the U.S. population had cell phone service. *Id.*

In 1993, Congress amended the Communications Act to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure." H.R. Rep. No. 103-111, at 260 (1993). These sweeping changes prohibited "any" state or local regulation of the "the entry of or the rates charged by any" wireless carrier, 47 U.S.C. § 332(c)(3)(A), and excluded wireless telecommunications from the traditional system of state regulation of intrastate telecommunications services and FCC regulation of interstate telecommunications services, *Id.* § 152(b); *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 373-74 (1986).

Congress failed, however, to extend the preemptive force of § 332 itself to state and local zoning decisions. The legislative history of the 1993 amendments makes clear that "facilities siting issues (e.g., zoning)" were considered to be within the "other terms and conditions" that were not subject to express statutory preemption under § 332. H.R. Rep. No. 103-111, at 261.

3. Rapid changes in the industry, spurred by the federal government's desire to encourage competitive wireless service, soon followed. Three developments dramatically increased demand for new cell sites: (1) Cellular subscription continued to grow rapidly, requiring the doubling of cell sites over a ten-

year period, *Reinventing Competition: The Wireless Paradigm and the Information Age*, CTIA Monograph, at 13 (Feb. 1995) ("*Reinventing Competition*"); (2) major SMR carriers moved to a cellularized model and began offering connections to the public telephone network in addition to their traditional mobile-to-base (or "dispatch") radio function; and (3) the FCC licensed PCS systems in 1994, which compete with cellular services, *Amendment of the Commission's Rules to Establish New PCS*, 8 F.C.C.R. 7700, 7710 (1993).[4]

The FCC imposed "build out" requirements on wireless carriers as conditions of their licenses.[5] The "most important goal" was to create "a seamless and integrated nationwide cellular service, so that subscribers [could] receive high quality cellular service throughout the nation." *Amendment of Part 22 of the Commission's Rules*, 6 F.C.C.R. 6185, 6187 (1991). The FCC also recognized the vital role that wireless communications play in emergencies, and since 1994 has worked with carriers to implement Enhanced 911 standards for wireless telephony nationwide. *Revision of Commission's Rules To Ensure Compatibility with E-911 Emergency Calling Systems*, 11 F.C.C.R. 18676 (1996).

While the need for new wireless infrastructure grew dramatically, wireless carriers seeking zoning approval for network construction increasingly confronted so-called "NIMBY" groups. As one commentator explained:

> NIMBY is an acronym that stands for "Not-In-My-Backyard." It refers to the phenomenon of local citizens who desire the benefit of essential infrastructure (*e.g.*, nursing homes and wireless telecommunications facilities), but want them

[4] Due to the physics of PCS systems, PCS providers require between four and seven cell sites to provide coverage identical to one cellular radio cell site. *U.S. West Petition for Expedited Partial Reconsideration and for Clarification*, GEN Dkt. No. 90-314, at 7-12 (Dec. 8, 1993). In 1994, CTIA estimated that the rollout of PCS necessitated as many as 100,000 additional cell sites. *Reinventing Competition*, at 13.

[5] The FCC mandated that licensees construct sufficient tower sites to provide coverage for their service area within a specified number of years. *See* 47 C.F.R. §§ 22.947, 22.949 (cellular), 24.203(a) (PCS), 90.685(b) (SMR).

> placed in locations other than their own neighborhoods or communities.

David W. Hughes, *When NIMBYs Attack: The Heights to Which Communities Will Climb To Prevent the Siting of Wireless Towers*, 23 J. CORP. LAW 469, 482-83 (1998) (footnotes omitted) ("*When NIMBYs Attack*").

The efforts of NIMBY activists in thousands of localities across the fifty states caused confusion, delay, and discrimination among wireless providers. Often, zoning boards would accede to residents' opposition by delaying or rejecting variance requests, resulting in litigation.[6] Carriers were whipsawed between federal "build out" and service obligations that were conditions of their FCC licenses and local requirements that prevented them from building out their networks.[7]

4. To address the related problems of NIMBY-ism, zoning board indifference or hostility, and irrational and unscientific claims regarding health effects of radio frequency emissions, the wireless industry, through the CTIA, petitioned the FCC

[6] *See, e.g., BellSouth Mobility Inc. v. Gwinnett County*, 944 F. Supp. 923 (N.D. Ga. 1996) (five minute testimony from a single resident found sufficient by zoning board to justify denial of tower permit, despite BellSouth's presentation of an Airspace Safety Analysis, a memorandum from County Departments of Transportation and Public Safety indicating no objection, an independent appraisal of property values, and a willingness to reduce the proposed pole height by 20 feet); *NYNEX Mobile Communications Co. v. Hazlet Township Zoning Bd.*, 648 A.2d. 724, 726-728 (N.J. Sup. Ct. App. Div. 1994) (zoning board denied use permit to locate antenna on existing tower based solely on generalized concerns of board and audience at hearing, where NYNEX produced testimony from town's former planner and drafter of town plan and zoning ordinance that permit was consistent with the town's plan, as well as supporting engineering testimony regarding health and safety issues).

[7] "[I]n many localities, tower construction is bogged down in a quagmire of community complaints and politically motivated governmental reviews. Thus, cellular providers are saddled with increasing demands of customers and federal licenses that *require the cellular company to provide adequate service* in the face of increasing opposition to telecommunications siting." Peter M. Degnan, et al., *The Telecommunications Act of 1996: § 704 of the Act and Protections Afforded the Telecommunications Provider in the Facilities Siting Context*, 3 MICH. TELECOMM. TECH. L. REV. 1, 2 (1997) (emphasis added), *available at* http://www.mttlr.org/volthree/mclaren.pdf (visited Dec. 17, 2004).

to preempt state and local tower siting regulations and replace them with a federal regime. *See Amendment of the Commission's Rules to Preempt State and Local Regulation of Tower Siting For Commercial Mobile Services Providers*, Petition for Rulemaking, RM 8577 (FCC Dec. 22, 1994).[8]

5. While CTIA's petition was pending, Congress began considering what would become the landmark Telecommunications Act of 1996 ("1996 Act"). In a committee report accompanying an early version of the 1996 Act, the House Commerce Committee found that "current State and local requirements, siting and zoning decisions by non-federal units of government, have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit the deployment of PCS as well as the rebuilding of a digital technology-based cellular telecommunications network." H.R. Rep. 104-204, Pt. 1, at 94 (1995). Thus, it was "in the *national interest* that uniform, consistent requirements, with adequate safeguards of the public health and safety, be established *as soon as possible*." *Id.* at 94 (emphases added).

Rather than completely divesting local authorities of any role in the zoning process and supplanting these entities with a federal administrative solution, Congress addressed the problem of zoning bottlenecks in a different fashion. Section 704 of the 1996 Act, codified as 47 U.S.C. § 332(c)(7), federalized much of the local zoning process requiring that all local zoning

[8] A few prominent examples from the record before the FCC include: (1) an Iowa zoning board that disregarded both a state legislative determination that cellular licensees were public utilities and an FAA determination that a particular cell tower posed no hazard to aviation, Comments of United States Cellular Corp., RM-8577, at 4 (Feb. 17, 1995); (2) the denial of a zoning permit based on the claim of a single resident that radiation from a cell tower killed one of her pet dogs, Comments of McCaw Cellular Communications, Inc., RM-8577, at 14 (Feb. 17, 1995); and (3) the denial of a permit to place a cell tower at a local sewage treatment plant because of putative concerns about health, migratory birds, and neighborhood character, Comments of Frontier Cellular Holding, Inc., Petition for Rulemaking, RM-8577, at 8 (Feb. 17, 1995). Even where a variance or conditional use permit was granted, it could take years to work through the multiple public hearings, denials, and resubmissions before construction could begin. Comments of Sprint Corp., RM-8577, at 4 (Feb. 21, 1995).

decisions be supported by a federal standard of "substantial evidence," and creating federal rights and immunities designed to guarantee wireless carriers fair, rational, and competitively neutral treatment and to furnish incentives for state and local officials to resist the political allure of NIMBY-ism. H.R. Rep. 104-458, at 208 (1996).

Section 332(c)(7) imposes five key limits on local zoning authorities, intended to "speed the approval and construction of wireless facilities by limiting the means by which local zoning boards could oppose these facilities." *Towering Problem*, 40 WM. & MARY L. REV. at 976. *First*, the zoning authority may not "unreasonably discriminate" among providers of functionally equivalent services. 47 U.S.C. § 332(c)(7)(B)(i)(I). *Second*, the authority may not issue a decision that "prohibit[s] or has the effect of prohibiting" wireless service. *Id.* § 332(c)(7)(B)(i)(II). *Third*, the authority must act on permit requests "within a reasonable period of time." *Id.* § 332(c)(7)(B)(ii). *Fourth*, the decision must be in writing and supported by substantial evidence contained in a written record. *Id.* § 332(c)(7)(B)(iii). *Fifth*, local and state governments may not regulate the placement of personal wireless service facilities on the basis of the environmental effects of electromagnetic radiation, so long as the facilities meet FCC standards. *Id.* § 332(c)(7)(B)(iv).

SUMMARY OF ARGUMENT

Section 332(c)(7) vests in wireless carriers a series of federal statutory rights designed to override traditional principles of local zoning law. Congress took this bold action to effectuate a broader federal policy goal—a goal that many local zoning authorities had systematically opposed and effectively frustrated. The statute expressly relies upon private enforcement in any court of competent jurisdiction to effectuate the national goal of creating a seamless wireless telecommunications infrastructure. Nothing in § 332(c)(7) bespeaks any intent by Congress to select or exclude any form of judicial relief.

Confronted with the reality that § 332(c)(7) does not contain a "comprehensive enforcement regime," let alone one that is "incompatible" with the remedial provisions of § 1983,

petitioners alternatively seek to import such a remedial scheme from federal common law or from the very state and local zoning principles that § 332(c)(7) was enacted to displace. This effort to call "spirits from the vasty deep" is fundamentally flawed. The focus must be on Congressional intent—as expressed *in the statutory scheme at issue*. Any other approach ignores the terms and function of § 1983 by improperly using implied judicial remedies to oust its express remedial provisions. It would also mean that any statutory right that satisfied the first prong of the test for enforcement under § 1983 would perforce fail the second and thus would never be enforceable under § 1983.

There is no incompatibility between § 332(c)(7) and § 1983. Section 332(c)(7) is the product of FCC and congressional frustration with many zoning authorities' conscious efforts to block deployment of wireless facilities. The award of damages and attorney's fees is appropriate where injunctive relief alone cannot vindicate federal rights and local zoning authorities engage in willful disregard of federal rights or administrative chicanery that frustrates their vindication. Because the Ninth Circuit faithfully applied this Court's precedents, and because the arguments of petitioners and supporting *amici* would effectively gut § 1983 as an enforcement mechanism for *all* federal statutory rights—not only those contained in § 332—the judgment of the court of appeals should be affirmed.

ARGUMENT

I. PETITIONERS CANNOT OVERCOME THE STRONG PRESUMPTION IN FAVOR OF THE AVAILABILITY OF § 1983 REMEDIES.

On its face, § 1983 creates no federal rights but supplies federal remedies against anyone who, under color of state law, deprives a person "of *any* rights, privileges, or immunities secured by the Constitution *and laws*." 42 U.S.C. § 1983 (emphases added). Nothing in § 1983 limits its reach only to certain types of federal rights, and this Court has recognized that § 1983 "means what it says" and extends to "laws" of the United States. *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980). Thus, where a federal statutory right is clearly at stake—as petitioners

and the United States concede here, Pet. Br. 33; U.S. Br. 16—there is a heavy presumption that Congress intended § 1983 to provide federal remedies for the deprivation of *any* federal right, unless Congress "specifically foreclosed a remedy under § 1983," *Smith v. Robinson*, 468 U.S. 992, 1005 n.9 (1984).

Petitioners therefore have the burden to demonstrate that Congress, by providing a cause of action in § 332(c)(7), intended to "close the door on § 1983 liability." *Blessing v. Freestone*, 520 U.S. 329, 348 (1997); *see Wright v. City of Roanoke Redev. and Hous. Auth.*, 479 U.S. 418, 424 (1987). Not even petitioners suggest that Congress expressly "forb[ade] recourse to § 1983 in the statute itself." *Blessing*, 520 U.S. at 341. Accordingly, petitioners must demonstrate that Congress "impliedly" foreclosed § 1983 liability "by creating a *comprehensive* enforcement scheme that is *incompatible* with individual enforcement under § 1983." *Id.* at 341 (emphases added). In the more than 20 years since *Maine v. Thiboutot*, this Court has found such an extraordinary implied ouster of § 1983 remedies only twice. *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981); *Smith*, 468 U.S. 992. This is not such an extraordinary case.

A. Petitioners' Attempt To Conjure Up a "Comprehensive Remedial Scheme" under this Court's Precedents Borders on the Frivolous.

Section 332(c)(7) grants a limited and identifiable class of beneficiaries a specific set of substantive and procedural rights. The substantive rights include a right to be free from state and local prohibitions on federally licensed commercial activity and immunity from anti-competitive discrimination by those governments. The procedural rights include the right to a written and timely decision. The statute contemplates the vindication of these federal rights through judicial enforcement—thus effectuating through private litigation the statutory goal of overcoming staunch local resistance to the rapid and efficient deployment of a seamless national wireless infrastructure. In this sense, § 332(c)(7) is no different from a host of federal statutes that create specific rights in private

parties, using private law suits to promote broader statutory goals.[9]

Section 332(c)(7)(B)(v) creates a private cause of action, authorizing "[a]ny person adversely affected" by any denial of the federal rights created by the statute to "commence an action in any court of competent jurisdiction." As petitioners themselves point out, Pet. Br. 2-3, 46, Congress specifically rejected a model of preemption through exclusive federal administrative proceedings in favor of creating specific rights enforceable in state or federal court. Section 332(c)(7) contains exactly the "sort of explicit 'right-or-duty creating language,'" *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 n.3 (2002) (citation omitted), that is "presumptively enforceable by § 1983," *id.* at 284. Indeed, this was undisputed below, *see Abrams v. City of Rancho Palos Verdes*, 354 F.3d 1094, 1096 (9th Cir. 2004), and is undisputed by the parties here.

Because § 332(c)(7) unambiguously vests respondent and all providers of personal wireless services with judicially enforceable federal rights, petitioners must establish that this is one of those "exceptional cases," *Livadas v. Bradshaw*, 512 U.S. 107, 133 (1994), where they can "make the difficult showing that allowing § 1983 actions to go forward in these circumstances 'would be inconsistent with Congress' carefully tailored scheme.'" *Blessing*, 520 U.S. at 346 (citation omitted). They cannot make that "difficult showing" without doing violence to the well-established methods of ascertaining congressional intent or radically reworking more than 20 years of § 1983 jurisprudence.

The text and structure of § 332(c)(7) reveal no evidence of a congressional intent to "close the door" on § 1983 remedies. The only affirmative (or negative) remedial choice Congress made in § 332(c)(7) was the decision to create judicially enforceable rights that could support *some* form of judicial relief. Nothing in the text, structure, or legislative history of

[9] *See, e.g.*, 20 U.S.C. §§ 1681-1688 (Title IX of the Education Amendments of 1972); 42 U.S.C. § 1396a(a)(13)(A); 42 U.S.C. § 2000d (Title IV of the Civil Rights Act of 1964); 42 U.S.C. § 1971 (Voting Rights Act). Each of these statutes creates individual rights, enforceable in federal court, to further national policy goals.

§ 332(c)(7) hints that Congress preferred any *one* form of judicial relief over *another*, or that Congress viewed § 332(c)(7) as a "comprehensive enforcement scheme" incompatible with the statutory remedies for vindicating federal rights presumptively available under § 1983.

To the contrary, Section 601 of the Communications Act conclusively proves otherwise. Section 601(c)(1) provides courts with a specific rule of statutory construction when faced, as here, with the question whether Congress in the Communications Act meant "impliedly" to affect the continuing applicability of any federal statute.[10] Section 601 mandates that the provisions of the Act "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act." 47 U.S.C. § 152 note, 110 Stat. 143. This statutory text—including the title, "[n]o implied effect"—makes clear that nothing in the Communications Act can overcome any other federal statute unless Congress says so explicitly. Congress has not expressly stated that § 1983 remedies are unavailable in a suit arising under § 332(c)(7); petitioners' only argument is that Congress impliedly ousted § 1983.

In light of the plain language of Section 601, as the Eleventh Circuit correctly understood, there is no reason even to examine the "comprehensiveness" of § 332(c)(7). *AT&T Wireless PCS, Inc. v. City of Atlanta*, 210 F.3d 1322, 1327 (2000), *vacated on other grounds*, 260 F.3d 1320 (2001). That inquiry is only an *indirect* means of ascertaining Congressional intent. *See Sea Clammers*, 453 U.S. at 20. Here, Congress has already *directly* and unambiguously expressed its intent with respect to any possible nullification by implication. The judicial review provisions of the Act "shall not be construed" to have any "implied effect" on § 1983.

Implicitly recognizing the lack of "rebuttal evidence" in the statute itself, petitioners' argument is consumed with drawing inferences from congressional *silence* and reaching

[10] Unlike the "savings clauses" at issue in *Sea Clammers*, Section 610 does not simply preserve substantive rights outside the Communications Act. *See* 433 U.S. at 20-21 n. 31. Rather, it supplies a rule of construction for assessing the interaction of the Communications Act with preexisting provisions of federal law, including § 1983.

outside of § 332(c)(7) for evidence that Congress meant to exclude § 1983 as an enforcement tool for this statute. Petitioners argue that because (a) § 332(c)(7) creates a federal cause of action, Pet Br. 4-5, 36; and (b) general principles of federal common law require federal courts to imply appropriate judicial relief where none is specified, Pet. Br. 37-39; these judicially implied remedies demonstrate that Congress intended to "shut the door" on all § 1983 remedies. *See also* U.S. Br. 16-17.

These endeavors are fundamentally flawed. Section 1983 is an express statutory authorization of certain remedies, intentionally crafted in general and capacious terms. The plain language of that provision provides that "[*e*]*very* person" who subjects "*any* citizen of the United States or person within the jurisdiction thereof to the deprivation of *any* rights" under federal law "*shall* be" liable for damages and attorneys fees. 42 U.S.C. § 1983 (emphases added). The notion that congressional silence, "federal common law," the inherent remedial powers of the federal courts, Pet. Br. 34-36; U.S. Br. 15-17, 20-22, or even the limits on state-court power to enforce state law, Pet. Br. 36-39, 41-45 & Apps. B & C, Nat'l League of Cities Br. 13-15, can constitute a "comprehensive enforcement scheme" sufficiently robust to overcome the plain language of § 1983 and the presumption in favor of its applicability is both unprecedented and unwise.

1. Section 332 breathes not a word about remedies. As petitioners concede, "[the statute] does not enumerate the available remedies." Pet. Br. 37; *see PrimeCo Personal Communications, L.P. v. City of Mequon*, 352 F.3d 1147, 1152 (7th Cir. 2003). Simply put, congressional silence as to remedies does not "a comprehensive enforcement regime" make. *See, e.g., Sea Clammers*, 453 U.S. at 20 ("When *the remedial devices provided in a particular Act* are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983." (emphasis added)); *id.* at 21 ("[T]he existence of these *express remedies* demonstrates ... that [Congress] intended to supplant any remedy that otherwise would be available under § 1983." (emphasis added)).

Nor can the failure to select or exclude any particular judicial remedies be deemed "incompatible" with application of a statute that is by design "a generally and presumptively available remedy for claimed violations of federal law." *Livadas*, 512 U.S. at 133. Section 332(c)(7) is no more or less compatible or incompatible with § 1983 remedies than it is with the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, the All Writs Act, 28 U.S.C. § 1651, or the Article III powers of the federal courts to remedy violations of federal law.

2. As both petitioners and the United States acknowledge, congressional intent is the touchstone of the rebuttal analysis under *Sea Clammers*. Pet. Br. 20; U.S. Br. 13. But heretofore the search for that intent has been limited to the text and legislative history of the federal enactment at issue; it has never been a free-floating inquiry into remedial possibilities outside the relevant statutory scheme. *See Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 521 (1981) ("[W]e have found private enforcement foreclosed *only when the statute itself creates a remedial scheme* that is 'sufficiently comprehensive ... to demonstrate congressional intent to preclude the remedy of suits under § 1983.'" (emphasis added) (quoting *Sea Clammers*, 453 U.S. at 20)); *Smith*, 468 U.S. at 1011 (relying upon the "comprehensive nature of the procedures and guarantees set out in the EHA" in finding *Sea Clammers* test satisfied).

In contrast to the established approach of analyzing the statutory enforcement scheme immediately surrounding the federal right at issue, looking to general judicially implied remedies makes no sense as a means of ascertaining congressional intent. Such remedies are, after all, created by the judiciary and, by definition, constitute no evidence as to Congress's intent concerning any particular federal right. *See Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 76 (1992) (Scalia, J., concurring in the judgment). Section 1983's remedial provisions are as much (or more) a part of the background against which Congress legislates than any remedy implied by application of "federal common law."

Only three Terms ago, the United States expressly recognized these principles, noting that once Congress creates a specifically enforceable statutory right, it "need not go further

and warn in advance of 'the remedies available against a noncomplying State.' *Section 1983's text already makes that clear.*" U.S. Br. at 8-9, *Gonzaga Univ. v. Doe*, No. 01-679 (filed Feb. 22, 2002) (emphasis added) (citation omitted). Given the state of the law in 1996, the most logical inference to be drawn from Congress's creation of a specific federal right, without the selection or exclusion of any form of judicial relief, is that Congress intended to authorize a federal court to award the relief authorized by § 1983.

Likewise, it is difficult to see how the judicial power to imply remedies could operate to "repeal or replace," *Smith*, 468 U.S. at 1012, § 1983 remedies. Unlike a judicially implied right of action or remedy, "§ 1983 provides an 'alternative source of *express* congressional authorization of private suits.'" *Wilder*, 496 U.S. at 509 n.9 (citation omitted). The very separation-of-powers concerns that militate against broad judicial implication of private remedies, *see Thompson v. Thompson*, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring in the judgment), counsel against finding that judicially implied remedies supplant a generally applicable remedial statute. Indeed, if legislative repeals by implication are "not favored," *Morton v. Mancari*, 417 U.S. 535, 549 (1974), one would think that repeals by "judicial implication" are forbidden, *see Franklin*, 503 U.S. at 77-78 (Scalia, J., concurring in the judgment) (suggesting judicial power to limit implied remedies because they "should be limited by the same logic that gave them birth").[11]

Not surprisingly, given its tenuous roots, the "comprehensive enforcement scheme" that petitioners would erect from background principles of federal and state law is of uncertain dimension. By positing that a federal court's power under § 332(c)(7) is limited to injunctive relief,

[11] That Congress knows how specifically to limit the availability of certain remedies by express provision is clear from the Communications Act itself. Section 635A(a) of the Communications Act, entitled "Suits for damages prohibited," specifically limits the ability of cable operators to seek damages from local governments for violations of federal rights. 47 U.S.C. § 555a(a) ("limit[ing]" suits against local cable franchising authorities to "injunctive relief and declaratory relief").

Pet. Br. 37-39[12]—which would fail to make some plaintiffs whole, *see infra* Part II—petitioners break faith with the Seventh Circuit opinion upon which they otherwise so heavily rely. *See PrimeCo*, 352 F.3d 1152-53 (conferral of a private cause of action to enforce a federal statute "is presumed to entitle a successful plaintiff to the usual remedies, [citing *Franklin*], which include damages as well as injunctive relief"); *see also Nextel Partners Inc. v. Kingston Township*, 286 F.3d 687, 695 & n.6 (3d Cir. 2002).

The United States is agnostic on this point, expressly avoiding "the question whether and under what circumstances other [non-injunctive] forms of relief are available." U.S. Br. 16 n.2. Petitioners too claim that this Court need not resolve the issue of availability of damages under § 332(c)(7) in order to find that statutory scheme sufficiently comprehensive to foreclose § 1983 remedies. Pet. Br. 38 n.12. The disagreement highlights the *ad hoc* nature of casting about for general principles of federal law and inherent judicial powers to conjure up a remedial regime to "repeal or replace" § 1983's statutory remedies.

3. Once petitioners' attempts to divorce the test for ouster of § 1983 remedies from the text, structure, and purpose of § 332(c)(7) are rejected, the argument that a "comprehensive enforcement scheme" exists in this statute is burlesque. The only two cases in which this Court has found a "comprehensive enforcement scheme" involved a panoply of administrative, public, and private enforcement mechanisms that this Court described as "unusually elaborate," *Sea Clammers*, 453 U.S. at 13, "carefully tailored," and "detailed," *Smith*, 468 U.S. at 1019, 1011.

[12] This is a quite a leap from *Franklin*, where the Court reiterated its prior rulings that "federal courts 'have the power to grant *all necessary remedial relief* for violations of [federal statutory rights]," 503 U.S. at 68 (emphasis added) (citation omitted), and "that the 'existence of a statutory right implies the existence of *all necessary and appropriate remedies*," *id.* at 68-69 (emphasis added) (citation omitted), and held that "a damages remedy is available for an action brought to enforce Title IX," *id.* at 76. Nowhere do petitioners explain how a party that suffers otherwise unrecoverable economic losses from a zoning board's violation of federal rights can be made whole with only injunctive relief. *See infra* Part II.

For example, in *Sea Clammers*, Congress made affirmative remedial choices that evinced a conscious design to include certain types of remedies and exclude others. These included administrative "compliance orders," civil actions by the EPA Administrator, federal civil and criminal penalties, state civil and criminal enforcement authority, and judicial review of actions by the EPA Administrator. 453 U.S. at 13-14. Both statutory schemes also contained "citizen suit provisions," which contained detailed requirements and exceptions to the private right of action and authorized only injunctive relief. 453 U.S. at 14.[13]

Similarly, in *Smith*, Congress made an affirmative choice to require, as a prerequisite to suit, an "elaborate procedural mechanism" that brought together all relevant parties in a mediation-type environment. 468 U.S. at 1011 (providing for state hearings before judicial review in "a process that begins on the local level and includes ongoing parental involvement [and] detailed procedural safeguards"). These carefully crafted "administrative remedies," designed to produce a non-adversarial process, constituted the comprehensive scheme inconsistent with the adversarial nature of federal litigation. *Id.* at 1101-02.

4. More fundamentally, petitioners and the United States rely upon the flawed premise that the availability of any form of judicial relief to vindicate a federal right ousts § 1983 remedies. Indeed, the United States goes so far as to urge this Court to erect a new rule—*any* statutory provision that creates a cause of action is per se comprehensive and therefore ousts § 1983 remedies as a matter of law. *See, e.g.*, U.S. Br. 15-17 & n.3

This accretion to the *Sea Clammers* rebuttal analysis has no foundation in the language of § 1983, the precedent of this Court, or logic. In fact, the strange regime advocated

[13] The "citizen-suit provisions" of each statute contained a detailed set of notice requirements and preclusion of suit where a governmental actor had initiated parallel civil or criminal proceedings. *Sea Clammers*, 453 U.S. at 6 n.9, *id.* at 7, n.11. The contrast with the unalloyed right to "commence an action in any court of competent jurisdiction," 47 U.S.C. § 332(c)(7)(B)(v), could not be more stark.

by the United States, and implicitly endorsed by petitioners, Pet. Br. 36, would eviscerate the very two-part test the government dutifully recites in its brief, U.S. Br. 12, and render those statutory rights that could be enforced pursuant to § 1983 a null set. Through the backdoor of "rebuttal analysis," the United States is asking this Court to take the radical step of overruling *Maine v. Thiboutot* by reading the "and laws" clause out of § 1983, as demonstrated below.

First, § 1983 unambiguously authorizes an aggrieved party to seek the relief enumerated therein for the deprivation of "any" "right[]" under the "laws" of the United States. 42 U.S.C. § 1983. Nowhere does it say that the absence of other judicial relief (or any other form of redress) is a precondition to the availability of remedies under § 1983, or that § 1983 is a civil action of last resort. Quite simply, § 1983 contains no hint of exclusivity.

Second, the rule advocated by the United States is contrary to more than one hundred years of jurisprudence. "Rights, privileges and immunities" granted by the Federal Constitution have been enforced by private parties against state actors since well before the passage of the Civil Rights Act of 1871. *See, e.g., McCulloch v. Maryland*, 17 (4 Wheat.) U.S. 316, 438 (1819); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 199-200 (1824). Similarly, federal courts enjoined state action in conflict with federal statutes well before the passage of what is now § 1983. *See, e.g., Weston v. Charleston*, 27 U.S. (2 Pet.) 449, 466 (1829). But the fact that judicial relief may be available independent of § 1983 to enforce federal law against state actors has never been held to work a per se ouster of § 1983. In fact, this Court has held exactly the opposite. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 108 (1989) ("[T]he fact that a federal statute has preempted certain state action does not preclude the possibility that the same federal statute may create a federal right for which § 1983 provides a remedy.").

Third, the United States' new rule guarantees that *no* statutory right will ever be enforceable under § 1983. That is because the very statutory indicia that would satisfy the

demanding first part of this Court's test for determining whether § 1983 relief is available (the existence of an enforceable federal "right" in the plaintiff) would, at the same time, constitute conclusive evidence that Congress intended to shut the door on any § 1983 remedy. Specifically, as to the first part of the test, the United States concedes, as do petitioners, that § 332(c)(7)(B) creates such a right. This means, as this Court explained in *Gonzaga* just three Terms ago, that there exists in the statute nothing "short of an unambiguously conferred right to support a cause of action brought under § 1983," and that § 332(c)(7) satisfies the standards articulated in this Court's implied right of action cases. *See* 536 U.S. at 283.

Indeed, as the Eleventh Circuit observed in *AT&T Wireless PCS*, there is no question that Congress intended that § 332(c)(7) confer benefits on particular individuals. By its terms, it allows "'[a]ny person adversely affected by any final action or falure to act by a State or local government . . . that is inconsistent with this subparagraph' to 'commence an action in any court of competent jurisdiction.'" 210 F.3d at 1326 (quoting 47 U.S.C. § 332(c)(7)(B)(v)). Nor is any right protected by § 332(c)(7) "so 'vague and amorphous' that its enforcement would strain judicial competence," 210 F.3d at 1326 (citation omitted), because it "imposes well-defined obligations on governmental entities," *id.*; *see* 47 U.S.C. § 332(c)(7)(B)(i)-(iv). In addition, "[t]he obvious inference" from Congress's decision to permit aggrieved parties to go to court pursuant to § 332(c)(7)(B)(v) "is that Congress itself believed that the rights protected [by the statute at issue] are not so vague and amorphous as to strain judicial competence." 210 F.3d at 1326. Finally, the statute's mandatory terms—"shall not unreasonably discriminate," "shall not prohibit or have the effect of prohibiting the provision of personal wireless services," and "shall [make any denial] in writing and supported by substantial evidence contained in a written record"—make clear that § 332(c)(7) "'unambiguously impose[d] a binding obligation' on the governmental body in question." *Id.* (citation omitted).

Under the United States' reasoning, the very satisfaction of the demanding "specific right" test enunciated in *Gonzaga* demonstrates Congress's intent to close the door on § 1983. As soon as the conditions for finding a right of action are satisfied, the statute will necessarily supply a cause of action and *some* avenue for "meaningful judicial review"; but the availability of that "meaningful judicial review" is always "sufficient" to find a comprehensive enforcement scheme that ousts § 1983 remedies. U.S. Br. 17 n.3. Thus, the United States conflates the two-part test for determining whether a right is enforceable under § 1983 into a single question (does an enforceable right exist?) to which *either* answer fails the test for the applicability of § 1983. This "heads I win, tails you lose" approach would eviscerate any enforcement of federal statutory rights through § 1983.[14]

B. Nothing in § 332(c)(7) Is Incompatible with the Judicial Remedies Made Available by § 1983.

Beyond what Congress *does not say*, none of what § 332(c)(7) *does say* evinces any congressional intent to "shut the door" on § 1983 relief. Petitioners do not even suggest that these limited procedural provisions—the 30-day statute of limitations and expedited review, 47 U.S.C. § 332(c)(7)(B)(v)—constitute a comprehensive enforcement scheme. Instead, they argue only that these provisions are inconsistent with the § 1983 remedy.[15] They are not.

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[14] Nor can the United States seriously contend that there is some difference between "explicit" or "express," U.S. Br. 4, 15, 21, and "implied" rights of action for purposes of its rule. Certainly it cannot be the United States' position that where Congress was less clear than in § 332(c)(7) about whether it intended to create a right of action, the § 1983 remedy should be more readily available. *See Franklin*, 503 U.S. at 78 (Scalia, J., concurring in the judgment).

[15] Petitioners also suggest that the requirement in § 332(c)(7) that there be "final action or a failure to act by a State or local government," prior to bringing suit erects some sort of "exhaustion" requirement that is inconsistent with § 1983. Pet. Br. 32 n.10; *see* U.S. Br. 25 n.5. There is, however, *no* requirement in § 332(c)(7) that applicants exhaust administrative remedies, such as by appealing any adverse decision to a board of review, filing a petition for reconsideration, or pursuing judicial review in state court. This is not a case where there is some *separate* and *additional*

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First, the centerpiece of petitioner's case for incompatibility – the "dramatic inconsistency" between the statute of limitations applicable to a § 1983 action in the abstract and the 30-day limitations period in § 332(c)(7), Pet. Br. 28; *see* U.S. Br. 23-25 – is ephemeral. Indeed, in their efforts to manufacture a conflict between the § 1983 and § 332 limitations periods, petitioner and the United States cannot even agree on what the applicable statute of limitations under § 1983 is or from whence it could be "imported." *Compare* Pet. Br. 28, 34 n. 11 (arguing that a four-year statute of limitations applies under 28 U.S.C. § 1658 and this Court's decision in *Jones v. R.R. Donnelly & Sons Co.*, 124 S. Ct. 1836 (2004)), *with* U.S. Br. 23 & n.4 (arguing that the limitations period for a § 1983 action would be "either the four-year period provided for in 28 U.S.C. 1658 . . . or the appropriate limitations period under *Wilson v. Garcia*, 471 U.S. 261, 267 (1985)"). Neither is correct. There is *no* inconsistency: the limitations period for a § 1983 action brought to enforce § 332 rights can only be 30 days, as respondent explains.

It is beyond dispute that there is no "specific statute of limitations governing § 1983 actions." *Wilson*, 471 U.S. at 266. Where the underlying federal rights are constitutional rights, they clearly do not contain their own limitations period, and this Court thus has developed judicial tools for determining the appropriate limitations period. Before Congress in 1990 enacted the federal catch-all statute of limitations, 28 U.S.C. § 1658, this Court faced the same task as to federal statutory rights. In both cases, the "settled practice [was] to adopt a local time limitation as federal law." *Wilson*, 471 U.S. at 266-67. It is unclear whether the four-year federal catch-all statute of limitations, which applies only to "a civil action arising under an Act of

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(Cont'd)

administrative process that must be followed before bringing suit. The first action by a zoning board "under color of" state law allows the filing of a suit in federal court. These provisions do not conflict with § 1983 – rather, they reflect standard ripeness principles for challenging state action that apply in any federal case.

Congress enacted after [December 1, 1990]," would apply to a § 1983 action seeking to enforce a right that did not exist until after 1990.[16] U.S. Br. 23 n.4. Neither method is necessary here, however, where the underlying statute that creates the federal right at issue itself establishes a statute of limitations for all judicial relief.

Where the underlying federal statutory right does include its own statute of limitations – 30 days in the case of § 332(c)(7) – there is no reason to look beyond that specific limitations period. *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 359 (1991). Both the "settled practice" under *Wilson* and 28 U.S.C. § 1658 expressly recognize that a directly applicable federal statute of limitations always governs and makes either the borrowing exercise or resort to the federal catch-all period unnecessary. *Wilson*, 471 U.S. at 266-67 (identifying the practice as "adopt[ing] a local time limitation as federal law *if it is not inconsistent with federal law or policy to do so*" (emphasis added)); 28 U.S.C. § 1658 (applying a four-year statute of limitations to actions brought under a federal Act "*[e]xcept as otherwise provided by law*" (emphasis added)). There is simply nothing "inconsistent" in applying a federal statute of limitations connected to a specific statutory right in an action under § 1983.

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[16] If the United States were correct that, even after the enactment of 28 U.S.C. § 1658, courts must import the applicable state statute of limitations for § 1983 actions, Congress's failure to specify a statute of limitations or its adoption of a specific statute of limitations would always "conflict" with § 1983. This is because § 1658's four-year limitations period would apply to any new federal cause of action that was otherwise silent, and any statute of limitations connected to the new right would conflict with § 1983 unless it mirrored the most analogous state statute of limitations under *Wilson*. Under the United States' view, the only way Congress could create new federal rights and avoid the "dramatic inconsistency" manufactured by the government would be to conduct the *Wilson* enterprise itself and specify that federal courts should engraft the applicable state statute of limitations onto the new federal cause of action, thereby achieving "consistency" with § 1983.

Second, contrary to petitioners' suggestion, Pet. Br. 28-29; *see* U.S. Br. 23-24, there is no conflict between Congress's direction that courts "shall hear and decide" § 332(c)(7) "action[s] on an expedited basis," 47 U.S.C. § 332(c)(7)(B)(v), and § 1983 relief. Even assuming that the requirement of "expedited" treatment has any teeth—a proposition belied by the procedural history of this very case[17]—it does not suggest any congressional hostility to § 1983 remedies.[18] The expedition requirement of § 332 *supplements* the procedures available under § 1983, but it does not *conflict* with them.

C. Petitioners' Argument that § 332(c)(7) Incorporates or Emulates Local Zoning Law Is Specious.

Much of petitioners' and their supporting *amici's* incompatibility argument rests on the extraordinary proposition that a federal law born of the recognition that local zoning law and procedures were stifling federal communications policy somehow adopted wholesale principles of local zoning law. Petitioners boldly assert that § 332(c)(7) "reflects a concerted effort to preserve and emulate traditional [state zoning] procedures." Pet. Br. 42.

The notion that Congress, frustrated with the Byzantine tangle of state zoning requirements and the obstructionist policies of certain local zoning administrations, would have adopted § 332 solely to "emulate" these policies defies logic. Even the United States concedes that the "antenna siting decisions [of local zoning boards] historically have threatened to impede the development of wireless communications." U.S. Br. 2. It goes on to note that, "[w]hen Congress considered telecommunications reform, it found that zoning had impaired the development of the wireless telecommunications industry," and that because the 1996 Act was designed to promote competition and "encourage

[17] It took the district court over sixteen months to conclude that the City had violated Abrams's rights, and two more years elapsed before the Ninth Circuit issued its ruling.

[18] Moreover, as a procedural matter, nothing prevents zoning boards and applicants alike from requesting expedited treatment for § 1983 claims brought to vindicate rights under § 332, and nothing precludes a court from granting such treatment where it believes it necessary to efficient administration of the case.

the rapid deployment of new telecommunications technologies," § 332(c) was amended to "impose specific restrictions on state and local regulation of personal wireless service facilities." *Id.* at 2-3 (citations omitted). Indeed, petitioners' argument is conclusively refuted by § 332's legislative history. Congress did not disturb local zoning authority in 1993, and it was dissatisfaction with that state of affairs that led to the passage of § 332(c)(7) in 1996. "If Congress had sought [in the 1996 Act] to maintain the status quo, it could have dispensed with the provisions of the 1996 Act relating to zoning authority." *Hog Tight*, 50 COMM. L. J. at 587.

In fact, § 332(c)(7)(B) contains three significant new rights that have no analogue in "traditional" state zoning procedures. *See* 47 U.S.C. § 332(c)(7)(A) (preserving local zoning authority "[e]xcept as provided in" the rest of § 332(c)(7)).[19] First, local zoning authorities may not issue a decision that "prohibit[s] or has the effect of prohibiting" wireless service. *Id.* § 332(c)(7)(B)(i)(II). This confers upon wireless carriers a unique federal protection—regardless of the existence of other justifications for denying an application, a zoning board is foreclosed by § 332(c)(7) from making a decision that prohibits or has the effect of prohibiting wireless service.

The First Circuit summarized the dramatic effect of this new federal right: "[L]ocal zoning decisions and ordinances that prevent the closing of significant gaps in the availability of wireless services *violate the statute*," and thus justify the imposition of a remedial order. *Plainville*, 297 F.3d at 20, 25

[19] Courts have recognized that § 332(c)(7) contains new federal rights, and does more than simply authorize a zoning board appeal in federal courts. *See, e.g., Voicestream Minneapolis, Inc. v. St. Croix Cty.*, 342 F.3d 818, 833 (7th Cir. 2003); *Nat'l Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14, 21-23 (1st Cir. 2002); *Town of Amherst v. Omnipoint Communications*, 173 F.3d 9, 15-16 (1st Cir. 1999). To this end, where federal rights under § 332(c)(7) are at stake, such as non-discrimination and the bar on prohibiting service, courts have looked beyond the record below and admitted new evidence and testimony for their *de novo* review of the issues. This is not the stuff of administrative appeal.

(citations omitted) (emphasis added). Thus, even if a local zoning authority's decision is based on "substantial evidence," it will not be upheld if it has "the effect of prohibiting the provision of personal wireless services." *Omnipoint Communications MB Operations, LLC v. Town of Lincoln*, 107 F. Supp. 2d 108, 115, 117, 121 (D. Mass. 2000).

Second, neither local nor state governments may regulate the placement of personal wireless service facilities on the basis of the environmental effects of electromagnetic radiation, so long as these facilities meet FCC standards. 47 U.S.C. § 332(c)(7)(B)(iv). Prior to § 332(c)(7), local communities often justified blocking wireless facilities on ephemeral environmental concerns. *See supra* n.8; *When NIMBYs Attack*, 23 J. CORP. LAW at 493-94 ("NIMBYs zealously make the [argument that] RF [Radio Frequency] emissions [are harmful] despite the lack of a connection between the human health effects from exposure to EMFs from electrical power lines and the human health effects from exposure to RF from wireless towers."). As Congress recognized early in the drafting of the 1996 Act, "[a] high quality national wireless telecommunications network cannot exist if each of its component [sic] must meet different RF standards in each community." H.R. Rep. 104-204, at 95. By eliminating this potential objection, Congress removed one of the most common methods for objecting to siting permits.

Third, § 332(c)(7) prohibits local zoning authorities from discriminating between providers of functionally equivalent services. 47 U.S.C. § 332(c)(7)(B)(i)(I). This section was designed to "ensure" that zoning boards could not "unreasonably favor one competitor over another." *Id.* By grouping the various constituents of "personal wireless services" together and prohibiting unreasonable discrimination among them, Congress forbade localities from using technological differences as a justification for blocking new entrants from the market, a problem encountered nationwide. "[Zoning authorities] all over the country have been actively discriminating against new cellular providers in the name of property value and

aesthetics, or more appropriately, NIMBYism." *Boom or Bust*, at 517. Thus, it is clear that § 332(c)(7) is not a wholesale adoption of traditional state zoning principles.

II. SECTION 1983 REMEDIES ARE A NECESSARY TOOL TO PROTECT WIRELESS LICENSEES' FEDERAL RIGHTS.

A. Section 1983 Remedies Are Necessary To Make Some Licensees Whole.

Section 1983 is necessary to allow courts to fashion remedies where injunctive relief alone would be insufficient. In *Omnipoint Communications, Inc. v. City of White Plains*, 175 F. Supp. 2d 697 (S.D.N.Y. 2001), for example, the zoning authority's unlawful delay in acting on Omnipoint's permit application resulted in the carrier losing a lease on the private property where it intended to build the tower. *Id.* at 706. An injunction requiring grant of a permit would do no good in that circumstance; indeed, the court suggested that without the § 1983 claim, the carrier's cause of action would have been moot, and the city's unlawful conduct would have escaped redress entirely. *Id.* at 706-07.

Similarly, damages under § 1983 may be appropriate if a zoning authority imposes gratuitous or excessive fees on a carrier seeking a permit. In *Nextel v. Town of Randolph*, an ordinance required that Nextel pay a $38,000 application fee and a $38,000 permit review fee in order to construct a single tower. 193 F. Supp. 2d 311, 314-315 (D. Mass. 2002). While the court found this fee to be excessive under state law, and further found a violation of § 332(c)(7), it also held that § 1983 remedies were not available. *Id.* at 321, 322. Fortunately, the municipality in *Randolph* had not insisted on upfront payment of the illegal fees, but the case illustrates how the lack of a damages remedy can leave a carrier with no redress for a blatant violation of federal right.

By providing the possibility of attorney's fees under § 1988, § 1983 serves another vital role in siting disputes. Petitioners attempt to portray all potential § 332(c)(7) plaintiffs as large well-financed corporations, Pet. Br. 31, but § 332(c)(7)'s protections also apply to smaller licensees providing personal

wireless services. CTIA members like Farmers' Wireless, which serves a 50-mile section of the I-59 corridor in Alabama, and Poka Lambro, which provides service to West Texas, would benefit from coverage under § 1988. The respondent in this case is a classic example of a small, entrepreneurial licensee who would not be able to enforce his federal rights absent the incentives created by the possibility of a fee award.

Moreover, stripping away the possibility of attorney's fees would disproportionately harm new entrants, who may not yet have revenues as large as previously established players. One of the primary motivations underlying § 332 was to encourage new entrants to build out new technologies and services. *See* H.R. Rpt. 104-204, Pt. 1, at 94. It would be perverse for Congress to enact a law designed to encourage market entry and then have the courts effectively restrict its enforcement to only those players with enough money to take on wealthy municipalities such as Rancho Palos Verdes.

B. Section 1983 Suits Are Necessary To Effectuate Federal Policy and Rein In Egregious Misconduct.

With the passage of the 1996 Act, Congress avoided creating a Washington-based bureaucracy that would deprive local zoning authorities of any involvement in zoning decisions. H.R. Rep. 104-458, at 207. Congress also specifically directed the FCC to terminate any pending rulemaking that might produce a similar result. *Id.* at 208. Instead, § 332(c)(7) gave wireless providers a set of procedural and substantive federal rights and authorized them to challenge local zoning decisions in federal court. The vigorous enforcement of these rights by private parties is thus the primary method that Congress selected to advance its goal of encouraging build-out of wireless infrastructure.

Experience has shown that every available remedial device and incentive to adhere to federal law is necessary in this realm. While numerous local zoning authorities work with wireless carriers to enable the delivery of new services, there remain many post-1996 Act instances of egregious local zoning authority misconduct.

- ***Telespectrum, Inc. v. Pub. Serv. Comm'n***, 227 F.3d 414, 417-18 (6th Cir. 2000) (public service commission could not justify denial of a permit to construct a tower when: (1) all surrounding land was agricultural; (2) "[w]ithin one thousand feet of the site [were] the remains of a burned-out single family residence, a yard containing ten to twelve automobiles in varying states of disrepair, a home built around a manufactured house and surrounded by tires and debris, and [a] single family ranch home"; (3) the provider offered evidence from engineers indicating importance of particular site; and (4) one of two objectors to the tower, who both lived in the "single family ranch home," challenged tower based on a "personal belief" the tower would negatively affect health and property values and on a belief that "the tower could be located at four [other] sites[,] showing photographs he had taken from his car as evidence").
- ***Omnipoint Communications, Inc. v. Vill. of Tarrytown***, 302 F. Supp. 2d 205, 208-216, 225 (S.D.N.Y. 2004) (permit application to install flush-mounted antennae on the side of a non-residential building, where a competitor already had facilities, was denied after eight separate public hearings spanning nearly one year, including numerous and repetitive requests on the part of the planning board and its consultants to study alternative sites that "would have 'transform[ed] the application into a self-perpetuating, endless odyssey'" (citations and quotations omitted)).
- ***Omnipoint Holdings, Inc. v. Town of Westford***, 206 F. Supp. 2d 166, 172-173 (D. Mass. 2002) (zoning board demonstrated "such fixed hostility" to permit applications that further applications would be useless; zoning board noted zoning bylaws precluded grant of application because there were "other uses" for the property, such as residential development, and Board member insisted that the

proposed tower was "nasty" and she "[didn't] want to look at it" (citations omitted)).

- ***Nextel Partners, Inc. v. Town of Amherst***, 251 F. Supp. 2d 1187, 1194-1995, 1201 (W.D.N.Y 2003) (zoning board "willfully disregarded the law" through discrimination when it denied carrier's request to place antennae on an existing tower that had three other wireless facilities already on it, after granting a similar application for another carrier two months earlier).
- ***White Plains***, 175 F. Supp. 2d at 701-707, 716-717 (after eight months, zoning board denied application to construct a tower, causing carrier to lose lease on tower site; zoning board disregarded detailed evidence that the aesthetic and property value impact of the tower would be low, including photo simulations, crane studies, and evidence based on actual home sales near cell towers, in favor of "unsupported fears of local residents" and "unsubstantiated opinions that property values would decrease"; unfounded implications made by zoning board of "chicanery...could be viewed as a reflection of an unacceptable bias on the part of the Board").

These decisions are not "mistake[s] in implementing the Act's often complex requirements," Pet. Br. 30, but are bald denials of federal rights by officials acting under color of state law. Congress established the protections in § 332(c)(7) to free wireless carriers from the "self-perpetuating, endless odyssey" that local zoning regulators can force carriers to endure. *Tarrytown*, 302 F. Supp. 2d at 225 (quotation omitted). There is no "distort[ion of] the decision-making process" from the threat of such suits. Pet. Br. 31. Rather, suits to enforce federal rights are vital to deterring local authorities such as those in *Tarrytown*, *Westford*, *Amherst*, and *White Plains* from "willfully disregard[ing] the law and wrongfully den[ying]" permit applications. *Amherst*, 251 F. Supp. 2d at 1201.

The availability of § 1983 claims enhances this deterrent effect. In particular, the "threat of attorneys' fees could influence zoning boards to ensure that their decisions comply with the [1996 Act]." *Smart SMR of New York v. Zoning Comm'n of the Town of Stratford*, 9 F. Supp. 2d 143, 148 (D. Conn. 1998). Clarifying that § 1983 remedies are available would also encourage carriers to use this tool, increasing private enforcement of congressional policy under § 332. Suits containing § 1983 remedies help ensure that zoning boards, who have ultimate control over whether wireless carriers can build or refurbish national networks, do not focus on the interests of their local constituents to the exclusion of the "national interest" in expeditiously building out a wireless communications infrastructure. H.R. Rpt. 104-204, Pt. 1, at 94. Localities should not be allowed to hold technological progress hostage. *See Lincoln*, 107 F. Supp. 2d at 121 ("A universal technological advance cannot be permanently stayed by a local stratagem devised to preserve the character and beauty of a locality.").

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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